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Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In The Matter of

TOLL FREE SERVICE ACCESS CODES

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CC Docket No. 95-155

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COMMENTS OF THE  
TELECOMMUNICATIONS RESELLERS ASSOCIATION

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November 1, 1995

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ASSOCIATION

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## TABLE OF CONTENTS

	<u>Page</u>
Table of Contents . . . . .	i
Summary . . . . .	iii
I. INTRODUCTION . . . . .	1
II. ARGUMENT . . . . .	4
A. The Commission Should Encourage the Efficient and Equitable Use of Toll Free Numbers by Modifying Existing Number Reservation and Assignment Procedures . . . . .	4
1. Assignment of Toll Free Numbers to Subscribers . . . . .	4
2. Reserving Numbers . . . . .	5
3. Reducing Lag Time . . . . .	6
4. Encouraging Use of PIN Technology . . . . .	8
B. New Toll Free Codes Should Be Administered in a Manner that Minimizes Waste and Minimizes Competition . . . . .	9
1. Equitable Reservation Procedures . . . . .	10
2. Phasing In New Toll Free Service Access Codes . . . . .	12
3. Deployment of New Toll Free Numbers . . . . .	13
C. The Commission Should Penalize Parties that Warehouse Toll Free Numbers . . . . .	15
D. The Commission Should Not Unnecessarily Limit the Availability of New Toll Free Numbers By Extending More Protection Than Is Warranted to Existing Users of Vanity Numbers . . . . .	16
1. An Unqualified Right of First Refusal Is Not Desirable . . . . .	17
2. Use of SIC Codes . . . . .	18

## TABLE OF CONTENTS

(continued)

	<u>Page</u>
3. Other Proposals . . . . .	19
E. Toll Free Directory Assistance Should Be Open to Competition . . . . .	20
F. The Service Management System Should Be Administered By a Neutral Third Party . . . . .	21
G. Local Exchange Carriers Should Be Required to File Tariff Revisions to Implement New Toll Free Codes on at Least 45 Days' Notice . . . . .	22
III. CONCLUSION . . . . .	22

## SUMMARY

The Telecommunications Resellers Association ("TRA") believes that the Commission should bear two goals in mind when establishing a new regulatory regime for the administration of toll free numbers: First, it should strive to devise policies and rules that will promote competition among toll free service providers. Second, it should create policies that will help to conserve numbers without the need for significant regulation and without compromising competition among toll free service providers.

The Commission should require Responsible Organizations ("RespOrgs") to obtain written, execute commitments from subscribers to use and pay for toll free numbers before the RespOrgs are permitted to reserve numbers in the Service Management System ("SMS") database. This requirement would be preferable to requiring an escrow deposit upon reservation of a number because it would achieve the same goal -- ensuring that there is a commitment to use each number reserved -- while not creating financial impediments to smaller competitors' ability to reserve numbers.

The lag time between the time between the cancellation or suspension of a toll free number and its reassignment could be gradually reduced to increase the quantity of toll free numbers that are available at any one time. Drastic reductions in lag time should, however, be avoided.

The use of Personal Identification Number ("PIN") technology should be encouraged because it increases the number of end users that can be reached via the same toll free number. The Commission should bear in mind, however, that PIN technology reportedly is inconsistent with number portability. Any policy of encouraging the use of

PIN technology should be balanced against the desirability of promoting number portability.

Procedures for allocating new toll free numbers should be designed to increase predictability and aid planning in the administration of such numbers. New toll free numbers should not be phased in, but should be made available at once to avoid artificial shortages. RespOrgs should not be permitted to reserve a toll free number unless they have a signed firm commitment from a subscriber to use and pay for the number. Lotteries should be used to resolve competing claims to the same toll free number. The Commission should establish a trigger of 50% depletion of existing toll free numbers to alert the industry to the need to prepare for deployment of a new service access code. The administrator of the SMS database, which should be a neutral third party unrelated to any RespOrg or carrier, should be required to make periodic reports to the Commission to enable the agency to track the use and depletion of numbers and to monitor compliance with the new policies. RespOrgs that are found to be warehousing numbers should be sanctioned, either with fines, suspension of reservation privileges, or de-certification of their status as RespOrgs.

Subscribers with vanity numbers should not be given a right of first refusal with respect to the same numbers having different service access codes, but, if they are accorded such a right, they should be required to pay for the privilege. A subscriber to a toll free number that is identical to an existing vanity number, but with a difference service access code, should be required to certify that it will not market or promote the number using the same alphabetical sequence as the earlier subscriber, and, if the party does so, it should

lose the number. An exception to this requirement would be where the two subscribers are involved in such different businesses that the risk of confusing consumers is minimal.

The Commission should open toll free directory assistance, which is now provided by AT&T as a monopoly service, to competition.

Local exchange carriers should be required to file any tariff revisions that are necessitated to implement the policies adopted in this proceeding on not less than 45 days' notice.

**Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

<b>In The Matter of</b>	)	
	)	
<b>TOLL FREE SERVICE ACCESS CODES</b>	)	<b>CC Docket No. 95-155</b>
	)	

**COMMENTS OF THE  
TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA" or "Association"), by its attorneys, and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415 (1995), hereby submits its Comments in response to the Notice of Proposed Rulemaking ("NPRM"), FCC 95-149 (released October 5, 1995).

**I.**

**INTRODUCTION**

TRA was created to foster and promote the interests of entities engaged in the resale of domestic interexchange and international telecommunications services. Employing the transmission, and often the switching, capabilities of underlying facilities-based network providers, the resale carriers comprising TRA create "virtual networks" to serve generally small and mid-sized commercial, as well as residential, customers, providing such entities and individuals with access to long distance rates otherwise available only to much larger users. TRA resale carrier members also offer small and mid-sized commercial customers

enhanced, value-added products and services, often including sophisticated billing options, as well as personalized customer support functions, that are generally not provided to low volume users.

TRA's members -- more than 350 resale carriers and their underlying service and product suppliers<sup>1/</sup> -- range from emerging, high-growth companies to well-established, publicly-traded corporations. They represent far and away the fastest growing sector of the long distance industry. Already populated by more than 1,000 carriers, the interexchange resale community currently serves millions of customers, representing tens of billions of minutes of long distance traffic, and generates annual revenues in the billions of dollars. And it is forecast that the market share of the interexchange resale industry will nonetheless double in size by the end of the century. As one financial analyst suggested in a recent Wall Street Journal article on the long distance resale industry, "[w]e don't see anything on the horizon that's going to slow this industry down."<sup>2/</sup>

Most of TRA's resale carrier members are not yet a decade old. Their emergence and dramatic growth over the past five to ten years has produced thousands of new jobs and myriad new business opportunities. In addition, TRA's resale carrier members have facilitated the growth and development of second- and third-tier facilities-based long distance providers by furnishing an extended, indirect marketing arm for their services,

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<sup>1/</sup> TRA also numbers among its members facilities-based interexchange carriers, foreign telecommunications administrations and carriers, Regional Bell Operating Companies, independent telephone companies, competitive access providers, and commercial mobile radio service ("CMRS") providers and resellers of CMRS.

<sup>2/</sup> Thomas, E., "Nibbling at the Edges," The Wall Street Journal, Vol. CCXXV, No. 54, March 20, 1995.



thereby further promoting economic growth and development. And perhaps most critically, by providing cost-effective, high quality telecommunications services to the small business community, TRA's resale carrier members have helped, and are helping, other small and mid-sized companies to grow their businesses and generate new jobs.

TRA was chartered, among other things, to represent the views of its members before the Commission, other federal and state regulatory agencies and departments, legislative bodies and federal and state courts. The Association is filing comments here in furtherance of that mandate. In TRA's view, market forces are, all things being equal, generally superior to regulation in promoting the efficient provision of diverse and affordable telecommunications products and services. TRA is well aware that the emergence, growth and development of a vibrant telecommunications resale industry is, and continues to be, a direct product of a series of pro-competitive initiatives undertaken, and pro-competitive policies adopted, by the Commission over the past decade. The market, however, is an effective regulator only if no participant benefits from competitive advantages arising from sources other than the participant's own efforts, which advantages are not available to other competitors. If one or more participants are possessed of advantages that were not the result of their own efforts, competitive provision of service will be impeded, and governmental intervention will be warranted to protect the public interest.

In the instant proceeding, the Commission is poised to ensure that competition is not hobbled by advantages available to some, but not all, competitors as a result of the

regulatory framework, and it should exercise its statutory authority and discretion in this area, as it has in others, in furtherance of that goal.

TRA's proposals herein are intended to advance twin goals: the conservation of toll free numbers through relatively unintrusive measures, and the promotion of competition in toll free service by limiting the opportunity for unearned competitive advantages without unduly burdening carriers or necessitating significant Commission regulation.

## II.

### ARGUMENT

#### A. **The Commission Should Encourage the Efficient and Equitable Use of Toll Free Numbers By Modifying Existing Number Reservation and Assignment Procedures.**

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Existing procedures for Responsible Organizations ("RespOrgs") and toll free service providers<sup>3/</sup> to reserve toll free numbers and assign them to subscribers should be tightened to conserve number resources and increase competition among toll free service providers.

##### 1. Assignment of Toll Free Numbers to Subscribers

RespOrgs and toll free service providers should be required to obtain a written commitment from a subscriber to order and pay for toll free service before they are permitted to assign a toll free number to the subscriber, and they should be required to maintain a record of each such commitment for at least two years. This procedure should reduce waste of numbering resources by eliminating the assignment by some RespOrgs and toll free service providers of toll free numbers to subscribers that have not even requested

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<sup>3/</sup> As used herein, "toll free service" means service accessed with numbers using a service access code of 800, 888, or 8XX, for which the called party pays for the call.

them, a problem noted by the Commission. NPRM at ¶ 13 & n. 35. In addition, since only toll free service providers or RespOrgs capable of reserving large quantities of toll free numbers would seem able to afford assigning toll free numbers to subscribers that had not ordered them, requiring a written commitment from each subscriber prior to assignment of a toll free number would promote competition by preventing the larger volume toll free service providers that are also RespOrgs or that are affiliated with RespOrgs from wasting the large quantities of toll free numbers to which they have access, to the competitive detriment of smaller service providers.

The promulgation of such requirements would be a reasonable exercise of the Commission's broad authority under Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be necessary in the execution of its functions." The Commission should formalize such requirements in its Rules, rather than requiring carriers to tariff the procedures. Not only would this approach be less burdensome for carriers, but the requirements would carry greater weight in the form of Commission Rules than they would if only incorporated in carriers' tariffs.

## **2. Reserving Numbers**

The Commission has sought comment on the use of an escrow deposit as a prerequisite to reserving a toll free number. NPRM at ¶ 14. Although such a procedure should, as the Commission noted, reduce waste by encouraging RespOrgs, service providers and subscribers to reserve only those numbers that they need, the administration of such a system would be more complicated than other means of achieving the same objective.

For example, if the Commission requires RespOrgs and toll free service providers to obtain written commitments from every subscriber before assigning a toll free number to such subscriber, this requirement could be extended to the reservation of toll free numbers as well. Before a RespOrg or service provider can reserve any toll free number, it should be required to demonstrate to the administrator of the Service Management System ("SMS") database that it has obtained a written commitment, executed by an authorized representative of the subscriber, to order the requested toll free number and to pay the applicable charges for the number. Such requirements would obtain the same result as requiring subscribers and/or service providers and RespOrgs to make a deposit before reserving a toll free number. *i.e.*, they would help to establish that any party reserving a toll free number has a firm intention to use and pay for the number.

Requiring an escrow deposit to reserve a toll free number could have an adverse effect on competition by deterring smaller toll free service providers from reserving numbers. Even if a deposit requirement did not deter smaller carriers, it would favor larger, better capitalized providers and RespOrgs, since they could afford to reserve large blocks of numbers. This anticompetitive result could be prevented by requiring, instead of a deposit, a written commitment by each subscriber for which a toll free number is reserved, as described above.

### **3. Reducing Lag Time**

In addition to modifying current reservation and assignment procedures, the Commission can further increase the quantity of available toll free numbers by reducing the time that numbers can remain in reserved status. Currently, toll free numbers can be

reserved for 60 days. This period initially should be reduced to 45 days to increase the quantity of toll free numbers that are available. Reducing the period for which a toll free number may be reserved complements the procedure proposed above whereby a subscriber would be required to execute a commitment before it could reserve a toll free number. If the 45-day period results in a greater quantity of available toll free numbers and does not create offsetting implementation problems, the period could be further reduced to 30 days.

Although the so-called "aging" process reduces the availability of toll free numbers during the period between disconnection or cancellation of a number and reassignment of the number, this period serves an important function, and should not be cavalierly reduced. Currently, disconnected numbers are "aged" six months before they can be reassigned to reduce the incidence of dialing wrong numbers once the number is reassigned, to protect the subsequent assignee of a previously used number from excessive expense for wrong numbers, and to minimize consumer confusion. The Commission has proposed reducing this aging period to four months. NPRM at ¶ 19.

TRA believes that the aging period should not be changed. The limited increase in the quantity of available numbers that might result from the proposal to reduce the aging period to four months would not seem to justify the foreseeable increase in misdialing, subscriber expense, and consumer confusion that could result from reduction of the aging period. Moreover, other measures, discussed above, would achieve the same result -- increase in the availability of toll free numbers -- without the disadvantages that would accompany reduction of the aging period.

#### 4. Encouraging Use of PIN Technology

Because the use of PIN technology can significantly increase the number of end users that can be reached via a single toll free number,<sup>4/</sup> such technology should be encouraged for all toll free subscribers, particularly subscribers intending to use a toll free number for personal communications, such as personal paging, or for other uses where a the subscriber and the end user are different entities, a low volume of calls to each end user is expected, a central switching point is feasible in light of the intended use of the number, and the use of such technology will not interfere with the achievement of other Commission goals, such as encouraging service provider number portability.

For example, personal paging services often involve a single entity -- the paging service provider -- that purchases toll free service and markets the paging services to many individual end users. Certain paging services currently use PIN technology with success. Future subscribers intending to use toll free numbers in such a manner should be encouraged to use PIN technology, perhaps by granting preferences to such subscribers for the reservation and assignment of vanity numbers.

TRA acknowledges the Commission's concern that requiring the use of PIN technology could place businesses using PIN numbers at a competitive disadvantage vis-a-vis businesses that do not use PIN numbers solely because the latter can be reached by dialing fewer numbers. This concern, however, could be addressed by requiring all subscribers whose usage of toll free numbers involves applications conducive to the use of PIN

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<sup>4/</sup> As the Commission has noted, a four-digit PIN enables as many as 10,000 end users to use the same toll free number. NPRM at ¶ 20.

technology to phase in PIN technology over a period of a year or more, so that, by a future date, all subscribers with similar usage requirements will be competitively equal in terms of the use of PIN technology.

If the concerns raised by the Commission that use of PIN technology may not permit portability of numbers<sup>5/</sup> prove to be realistic, however, the Commission should revisit any requirement mandating the use of PIN technology, weighing the advantages of encouraging the use of such technology against the disadvantages of non-portability. Number portability should not be compromised unnecessarily because of actions in this proceeding.

**B. New Toll Free Codes Should Be Administered In a Manner that Minimizes Waste and Maximizes Competition.**

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TRA concurs with the Commission that, in order to avoid exhaustion of available toll free numbers in the future, some adjustments should be made to the manner in which toll free codes are administered, thereby adding a greater degree of predictability and planning to the administration of toll free numbers.

Few TRA long distance resale carrier members are RespOrgs. TRA's resale carrier members generally designate their underlying network providers as their RespOrgs. Hence, facilities-based carriers such as AT&T, Sprint, and WilTel are RespOrgs for hundreds of resale carriers. Other RespOrgs, including large corporate users and smaller facilities-based and resale carriers, provide service only to themselves, or to a relatively limited number of other entities. Accordingly, the impact of restricting each RespOrg to a limited number of

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<sup>5/</sup> NPRM at ¶ 20.

toll free numbers would have -- and has had -- dramatically different impacts among individual RespOrgs and the entities to whom they provide service. Restricting a RespOrg such as AT&T, Sprint, or WilTel to a limited number of toll free numbers per week or per month likely would mean that resale carriers would receive fewer toll free numbers. Long distance resale carriers' marketing efforts and business growth and development obviously will suffer in the absence of new toll free number assignments. Resale carriers can not sell what they do not have.

This problem is compounded by the conflicting interests of the underlying facilities-based carriers that serve as RespOrgs for most long distance resale carriers. These facilities-based carriers need toll free numbers to satisfy the demand of their direct sales channels. In a shortage circumstance, economic rationality dictates that they will utilize their allotment of toll free numbers to satisfy these direct sales channel demands before they assign toll free numbers to resale carriers.

#### 1. Equitable Reservation Procedures

One reform that should be adopted relates to the ability of RespOrgs to reserve the greater of 1,000 numbers or 15% of the total working toll free numbers handled by the RespOrg. This policy, which has traditionally applied to 800 numbers,<sup>6/</sup> relies on the good faith of RespOrgs not to reserve numbers which are not immediately required for subscribers.<sup>7/</sup> In practice, however, it seems to have allowed larger RespOrgs to reserve

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<sup>6/</sup> Industry Guidelines for 800 Number Administration (June 8, 1995) ("Industry Guidelines") at § 2.2.5.

<sup>7/</sup> NPRM at ¶ 32 & note 69.



more toll free numbers than they really need, and to have disadvantaged smaller RespOrgs, by tying up large quantities of numbers not immediately needed by subscribers and by giving larger RespOrgs a headstart at reserving numbers that are considered strategically important, such as vanity numbers.<sup>8/</sup> This disadvantage is compounded by the ability of larger RespOrgs to interconnect directly with the SMS database, and thereby to order rapidly large quantities of toll free numbers.<sup>9/</sup> Smaller, less technologically sophisticated RespOrgs are often unable to order numbers electronically and therefore are competitively disadvantaged.<sup>10/</sup>

In light of the Commission's stated goal of making the allocation of toll free numbers a fair and equitable process,<sup>11/</sup> the ability of larger RespOrgs to order rapidly and to secure strategically significant numbers ahead of their smaller competitors should be curbed. RespOrgs that are able to reserve numbers instantaneously by direct connection to the SMS database should not be permitted to reserve numbers before they are in receipt of a firm expression of interest from a subscriber for the number. This requirement would essentially eliminate the advantage that large RespOrgs have over smaller RespOrgs that lack capability of interconnecting with the SMS database.

The Commission should also articulate procedures for resolving disputes when more than one party requests the same toll free number. The current first-come, first-served

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<sup>8/</sup> NPRM at ¶ 23.

<sup>9/</sup> *Id.*

<sup>10/</sup> *Id.*

<sup>11/</sup> *Id.*

approach is skewed in favor of the more established RespOrgs, which can order toll free numbers electronically and thereby tie up large quantities of numbers through direct connection with the SMS database.

If the Commission continues to allow RespOrgs to reserve large quantities of uncommitted numbers electronically, a lottery procedure would seem to be the most equitable method of resolving competing claims for the same number, as the Commission has suggested.<sup>12/</sup> Lotteries should be the only method of allocating particular toll free numbers that are in high demand, such as 8XX-555-XXXX, as they are the most equitable means to allocate scarce resources. If the Commission wishes to ensure that such scarce resources as 8XX-555 numbers are not wasted on parties that are unable to offer the public the greatest benefits available with those numbers, it could devise certain minimum criteria that parties would have to satisfy to be eligible to participate in the lotteries.

## **2. Phasing In New Toll Free Service Access Codes**

The Commission has proposed that new toll free service access codes be made available gradually by limiting the quantity of toll free numbers that could be withdrawn from the SMS database within a period of time.<sup>13/</sup> TRA believes that such phasing in of new toll free numbers would not be in the public interest, and that all toll free numbers should be available from the outset. An approach whereby numbers are made available gradually could create the risk of temporary artificial shortages of toll free numbers, and it

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<sup>12/</sup> NPRM at ¶ 23.

<sup>13/</sup> NPRM at ¶ 24.

would necessitate the establishment of procedures for rationing numbers, implementation of which could be discriminatory and detrimental to competition and industry growth.

### 3. Deployment of New Toll Free Numbers

To further aid planning and predictability, the Commission should take several steps to increase industry preparedness for the inevitable depletion of the 888 numbers and the introduction of the next wave of toll free numbers, having a service access code of 877.

**First**, as it has proposed,<sup>14/</sup> the Commission should establish a "trigger" to alert the industry that depletion of the existing toll free code is foreseeable and preparations should be commenced for deployment of a new code. Notification to the industry that the trigger event has occurred should be the responsibility of the SMS database administrator, and this should occur when fifty percent of the new toll free numbers have been reserved.

**Second**, the Commission should establish a time within which implementation of the new toll free code should occur, which should run from the date that the SMS administrator notifies the industry that the trigger has occurred.<sup>15/</sup> Within the time prescribed by the Commission, hardware and software upgrades, including installation and testing, should be required to be completed, to ensure that the industry is equipped to handle the new code before the existing code is completely depleted.

In this regard, the Commission should adopt its proposal that, by February, 1997, all network switches should be required to support all toll free codes reserved by January,

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<sup>14/</sup> NPRM at ¶ 27.

<sup>15/</sup> See NPRM at ¶ 28.

1995.<sup>16/</sup> Such a mandate would seem to be reasonable in light of the Commission's statement that major switch and software vendors have committed to have equipment and software ready for installation in ample time to meet such a deadline.<sup>17/</sup> Within the same time frame, call set-up times for all toll-free codes should be required to meet the parameters established in the 800 Database proceeding,<sup>18/</sup> as the Commission has tentatively concluded.<sup>19/</sup>

**Third**, as proposed, the Commission should require the require the administrator of the SMS/800 database to make periodic reports to it including (1) the quantity of numbers that are available; (2) the quantity of numbers that are in use; (3) the quantity of numbers that are assigned to working status each month; (4) the estimated time that will elapse before a code is exhausted; and (5) the methodology used to make that estimate.<sup>20/</sup> In addition, the Commission should require the administrator to report (1) the quantity of numbers requested by more than one party; (2) how conflicting requests were resolved; and (3) the quantity of numbers reserved by and assigned to various categories of RespOrgs, by size of RespOrg (in terms of historical toll free number usage), the type of entity the RespOrg represents (such as interexchange carrier, local exchange carrier, wireless carrier, large non-communications corporation, etc.), and the number and types of entities that are

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<sup>16/</sup> NPRM at ¶ 29.

<sup>17/</sup> *Id.*

<sup>18/</sup> 800 Reconsideration Order, 6 F.C.C. Rcd. 5421 (1991); see NPRM at notes 12 and 64.

<sup>19/</sup> NPRM at ¶ 30.

<sup>20/</sup> NPRM at ¶ 31.

the RespOrgs' customers. This information would not only help track the use and depletion of toll free numbers, but would assist in monitoring the fairness of the new allocation procedures.

**C. The Commission Should Penalize Parties that Warehouse Toll Free Numbers.**

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As the Commission has noted, it appears possible that, despite industry guidelines,<sup>21/</sup> certain RespOrgs are warehousing toll free numbers, *i.e.*, they are reserving numbers for which they have no immediate order from a subscriber.<sup>22/</sup> Because of the inhibiting effect that this practice has on competition in toll free service and the accelerating effect it has on toll free number depletion, the Commission should adopt its tentative conclusion that warehousing of toll free numbers is an unreasonable practice under Section 201(b) of the Communications Act, and it should penalize RespOrgs that are found to be warehousing numbers by fining them, suspending their ability to reserve additional numbers for a period of time, reducing the quantity of numbers they can reserve at any one time, or even de-certifying them as RespOrgs. Such sanctions would seem to be within the Commission's authority under Sections 4(i) and 503<sup>23/</sup> of the Communications Act, 47 U.S.C. §§ 154(i), 503. Moreover, the Commission should limit the quantity of numbers a party can reserve, as proposed in Section B.1, above.

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<sup>21/</sup> Industry Guidelines at § 2.2.5.

<sup>22/</sup> NPRM at ¶ 33.

<sup>23/</sup> Section 503(b)(1)(B) provides for forfeiture penalties for violations of Commission rules promulgated under the Communications Act. 47 U.S.C. § 503(b)(1)(B). If the Commission adopts a rule prohibiting warehousing of toll free numbers, a violation of that rule could be sanctioned with a forfeiture under Section 503.

In addition, as it has proposed, the Commission should require all RespOrgs to certify on a quarterly basis that there is an identified subscriber that has agreed to be billed for each toll free number requested from the database, and that there is an identified, billed subscriber for any number the RespOrg seeks to switch from reserved to working status.<sup>24/</sup> Although RespOrg reports should be required to provide a minimal amount of customer-specific information to facilitate Commission monitoring of the accuracy of the certifications, such information should be kept strictly confidential, and care should be taken not to disclose publicly competitively sensitive information about a customer without the customer's prior written consent. To conserve limited Commission resources, the accuracy of such certifications could be verified by spot-checks or random audits.

**D. The Commission Should Not Unnecessarily Limit the Availability of New Toll Free Numbers By Extending More Protection Than Is Warranted to Existing Users of Vanity Numbers.**

The legitimate interest of subscribers in protecting the commercial value of vanity toll free numbers -- *i.e.*, numbers that spell a significant word -- assigned to them should be balanced against the public interest in the widest availability of toll free numbers and the recognition that no party has an ownership interest in a particular telephone number.<sup>25/</sup> The fact that a subscriber has invested substantial resources in advertising or promoting a certain vanity number should not be disregarded; nor should it provide the subscriber with *carte blanche* rights to similar numerical combinations using different service access codes.

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<sup>24/</sup> NPRM at ¶ 34.

<sup>25/</sup> NPRM at ¶¶ 36, 38 & notes 79-83.

1. **An Unqualified Right of First Refusal is Not Desirable.**

While a subscriber to a vanity number having an 800 service access code should be entitled to some protection from other subscribers using similar 800 numbers, and perhaps even from subscribers seeking to use the same number, though with a different service access code, that subscriber should not be given a right of first refusal with respect to the same number having different service access codes. Such a preemptive right would unnecessarily limit the universe of available vanity numbers, and would preclude the use of the same combination of numbers (albeit with different service access codes) even if they are promoted as spelling different words. For example, while the subscriber whose well-known toll free number is 1-888-THECARD should be entitled to some protection of that combination in light of the significant resources that subscriber has devoted to promoting the number, overbroad protection could prevent other subscribers from obtaining toll free numbers with the same combination of numbers, but different service access codes, even if they promoted such numbers using different combinations of letters, such as 1-888-THECASE, 1-877-THEACRE, 1-866-THEBARD, 1-855-THEBASE, or 1-844-TIECARE.

A compromise position exists which would protect the proprietary interest of the earlier subscriber in its vanity number while permitting use of the same combination of numbers, though with different service access codes. Any subscriber seeking to use the same combination of numbers as the vanity number of another subscriber with a different service access code should be required, as a condition of assignment of that number, to commit that it will not promote or market the number using the same words as the earlier subscriber unless the two subscribers are engaged in businesses that are so different that the

risk of confusion by consumers of the two subscribers is virtually non-existent. Failure of the later subscriber to comply with this requirement should be grounds for cancellation of the subsequent subscriber's right to use the number.

If the Commission determines that subscribers of vanity numbers should be accorded a right of first refusal with respect to similar numbers having different service access codes, the subscribers should be required to pay a fee before they can exercise that right. As noted previously, no party has an ownership interest in numbers, which are a public resource,<sup>26/</sup> and any enlargement of a subscriber's limited right to use a certain number is a privilege for which the subscriber should be required to pay. The fee paid for such a privilege could be used to defray the cost of administration of the SMS database or the North American Numbering Plan, and it could be imposed every time a potential subscriber is blocked from reserving the preempted number, to reflect the true value of the number in the eyes of potential subscribers. If an incumbent subscriber is unable or unwilling to pay the fee, then the requested number should be assigned, subject to the earlier proposal that the later subscriber be prohibited from promoting or marketing the number using the same words as the earlier subscriber unless the two subscribers are engaged in businesses that are so different that the risk of confusion is virtually non-existent.

## 2. Use of SIC Codes

The Commission has sought comment on a rather elaborate alternative to the right-of-first-refusal approach which would require subscribers to report their Standard Industrial

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<sup>26/</sup> See *supra* note 25.



Classification ("SIC") codes, and which would determine by reference to their SIC codes whether later potential subscribers are competitors of earlier subscribers for purposes of assigning the same number with a different service access code.<sup>27/</sup> As proposed, this process seems somewhat cumbersome, and it could entail administrative burdens which would not seem justified by the limited protection that the approach would provide. Limited use of the SIC codes would, however, furnish a useful method of determining whether a subscriber and a would-be subscriber are competitors, as described in section 1, above.

### 3. Other proposals

The Commission has sought comment on other alternatives to the right of first refusal and use of SIC codes, including: (1) requiring the SMS administrator to release vanity numbers similar to those having the 800 service access code last, *i.e.*, after a certain percentage of other toll free numbers have been assigned; (2) using a transitional gateway where callers to the same number having different service access codes would first receive a message asking them which party they wish to reach; and (3) "partitioning" numbers so that most business subscribers and holders of vanity numbers would be required to use the 800 service access code, and others would get to use new service access codes.<sup>28/</sup>

The first proposal would not seem to solve the problem of protecting the proprietary interest of subscribers with vanity numbers having the 800 service access code, only to delay the problem.

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<sup>27/</sup> NPRM at ¶¶ 44-45.

<sup>28/</sup> NPRM at ¶ 46.